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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1041

MICHAEL DUBINA,

Petitioner,

vs.

PEOPLE OF THE STATE OF MICHIGAN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND BRIEF IN SUPPORT THEREOF.

JAMES B. STANLEY,
Counsel for Petitioner.

HARRY C. HOWARD,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1041

MICHAEL DUBINA,
Petitioner and Appellant Below,

vs.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Michael Dubina, respectfully prays for a writ of certiorari to review a judgment of the Supreme Court of the State of Michigan entered February 23, 1943.

Summary Statement of Matter Involved.

This case challenges the validity under the due process clause of the 14th amendment to the Federal Constitution of Act No. 259 of the Public Acts of Michigan of the regular 1939 session hereinafter referred to as the Act.

In the trial court petitioner was charged with the crime of murder (R. 1) and was acquitted by a jury who also found

him insane at the time of the alleged acts claimed to constitute murder (R. 19). Defendant's plea was temporary insanity (R. 4) brought on by the deceased and the killing occurred at the height of a homo-sexual panic (R. 4, 18). The day following the verdict the petitioner was committed for life under the act by the trial court (R. 22).

The federal questions involved here were reserved by appropriate motion before the trial court who overruled the same without opinion (R. 23-24) and were reserved by reasons and grounds of appeal and assignments of error before the Michigan Supreme Court (R. 13-16). The latter court ruled specifically on the claim that the Act was repugnant to the due process clause of the 14th amendment and upheld the validity of the Act as not being repugnant to the 14th amendment (R. 25-33).*

Petitioner remains confined today at Ionia Hospital in Michigan, an institution primarily used for transfer of insane inmates from other Michigan penal institutions and prisons. There were no factual questions involved in the appeal to the Michigan Supreme Court and none are involved here.

Jurisdiction.

Jurisdiction is invoked under Section 237 (b) of the Judicial Code as amended by Act of Feb. 13, 1925, Ch. 299; Sec. 1, 43 Stat.; Sec. 344 of Title 28 U. S. C. A. in that a judgment has been rendered by the highest court of the State of Michigan sustaining the validity of a Michigan Act claimed by petitioner to be repugnant to the due process clause of the 14th amendment to the Federal Constitution. Judgment entered by the Michigan Supreme Court on February 23, 1943 (R. 33) and this petition being made on date endorsed hereon and being mailed to the clerk of this Honor-

* In lieu of appending lengthy typed opinion same appears in printed form at reference.

able Court as of even date and to be filed within the three months period of limitation. Petitioner elects this method of review rather than by writ of error allowable under Sec. 237 (a) of the aforesaid Act or Act of Jan. 31, 1928, Chap. 14, 45 Stat. 54. Petitioner's method was followed in *Skinner* v. *Oklahoma,* 316 U. S. 535 in reviewing a State Act upheld by the State court.

Statute Involved.

The legislative Act claimed by petitioner to be repugnant to the 14th amendment is Act No. 259 of the Michigan Public Acts of 1939 which may be found on pages 476 and 477 of the officially reported Acts and also in the Michigan Supreme Court opinion (R. 25). Said Act verbatim is as follows:

Michigan Statutes Anno, 28.933 (1)

"Sec. 15a. Whenever any person charged with murder under the laws of this state, has been bound over to the court having jurisdiction of such criminal case, and the return is filed with the clerk of such court, the clerk shall forthwith notify the state hospital commission of that fact and such commission as soon as possible thereafter, shall cause such person to be examined for the purpose of determining his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. The commission shall designate 3 psychiatrists, as herein defined, for the purpose of making such examination. The report of such psychiatrists shall be transmitted by the commission to the clerk of said court and shall be accessible to the court, the probation officer thereof, the attorney general, prosecuting attorney and the attorney for such person. For making such examination each psychiatrist shall receive mileage at the rate of 10 cents per mile, and each psychiatrist who is not in the employ of the state shall also receive such fee as the trial court shall determine.

28.933 (2)

Sec. 15b. Any clerk of a court, or deputy clerk, who wilfully neglects to perform any duty imposed upon him by the preceding section shall be guilty of a misdemeanor and subject to imprisonment for not to exceed 90 days and a fine of not to exceed $100.00 or both such fine and imprisonment in the discretion of the court.

28.933 (3)

Sec. 15c. Any person, who is tried for the crime of murder and is acquitted by the court or jury by reason of insanity, shall forthwith be committed by order of said court to a state hospital for the criminally insane for the remainder of his natural life. The Governor may, however, discharge such person upon recommendation of the commission, based upon an investigation by it and its determination that such discharge will not be harmful to other persons or their property.

28.933 (4)

Sec. 15d. A psychiatrist under the meaning of the foregoing sections is a physician, duly licensed to practice in the state of Michigan, who has had at least 5 years' experience in actual practice, including either (a) 3 years' full time practice since January 1, 1935, in the care and treatment of persons suffering from nervous or mental disease or mental defect, in an institution provided for the care of such persons, or (b) has devoted 5 years prior to the case in which his services are requested, to a practice confined wholly or substantially to the diagnosis, care or treatment of persons suffering from nervous and mental disease or mental defect."

Questions Presented.

Does the final judgment of the Michigan Supreme Court sustaining the validity of the Act deprive petitioner of due process of law in that there was no hearing provided for or had prior to his committment in an institution for life?

May the State under the guise of a criminal verdict of "Not Guilty" summarily take the liberty of a defendant and hold him confined until he establishes sanity, with burden of proof upon him, without violating the due process clause?

Reasons Relied On for Allowance of Writ.

The Michigan Supreme Court erred in holding that petitioner may be deprived of his liberty summarily and permanently without first allowing him an opportunity to be heard before some judicial tribunal on the reasons for the proposed incarceration.

The Michigan Supreme Court erred in holding that a legislative Act of the state providing for no hearing before permanent commitment was not repugnant to the due process clause of the 14th amendment.

The Michigan Supreme Court erred in holding that a right of habeas corpus with burden of proof upon petitioner to establish sanity at subsequent periods after summary commitment fulfilled the due process requirement in the original instance.

This precise question has not heretofore been decided by this Honorable Court. But this Court has rendered similar and applicable decisions not in accord with the Michigan Supreme Court opinion in this case. These decisions were not mentioned in the Michigan opinion. They sustain the proposition that the essential elements of due process are notice and an opportunity to be heard and to defend in an orderly proceedings before a tribunal having jurisdiction and are as follows:

Baldwin v. *Hale,* 1 Wall. 223;
Ray v. *Norseworth,* 23 Wall. 128;
Riverside Mills v. *Menefee,* 237 U. S. 189;
Orchard v. *Alexander,* 157 U. S. 372;
Simon v. *Craft,* 182 U. S. 427;
Twining v. *New Jersey,* 211 U. S. 78;

Ballard v. *Hunter*, 204 U. S. 241;
Scott v. *McNeal*, 154 U. S. 34;
Taylor's Due Process of Law, page 286.

Certainly these decisions were worthy of comment by the Michigan Court and had the court believed them to be distinguishable this fact ordinarily would be mentioned. The foregoing statement that the precise questions had not previously been decided goes only to an insertion in the question involved which is incidental, of no consequence and in no way leads to a distinguishing of the principle involved in the cited cases. This new matter resolves itself around the fact that prior to commitment there was a criminal prosecution in which a defense of temporary insanity was raised and a verdict determining the collateral issue of lack of intent was rendered simultaneously with that of "Not Guilty". On the trial of the case the question of lack of intent or temporary insanity was disputed by the State (R. 17-18) and the report of the psychiatrists appointed by the state Hospital Commission prior to trial was to the effect that petitioner was sane (R. 2-3).

A highly important and substantial question is involved. Probably no greater fundamental right exists, (if it can be said that constitutional rights are comparative) than the due process clause in so far as it relates to some kind of opportunity to be heard before a person is restrained permanently of his liberty.

In New York, California and Washington the state courts have upheld similar statutes on a theory that right to be released after confinement on showing of sanity is a good substitute for a hearing before commitment and therefore due process is met. If this is the test of due process then it could apply with equal force to any confinement for any

reason providing the prisoner has a right at some subsequent period to show that the reasons for such confinement are not justified. Such is obviously not a true statement of the fundamental constitutional guaranty and it was never intended that it should be construed by such illogical legal gymnastics. Where personal liberty is concerned and involved there can be only one definition of due process so adequately expressed by Daniel Webster in the Dartmouth College case as being "a law which hears before it condemns; which proceeds upon inquiry; and renders judgment only after trial", a phrase often repeated and adopted by this and many Courts of the land.

Dartmouth College v. *Woodward,* 4 Wheat. (U. S.) 518.

Much more logical are the dissenting opinions in some of the state cases and in two federal cases. The Washington state act was held unconstitutional in the lower federal courts because no hearing was allowed before commitment and therefore was repugnant to the 14th amendment. *Brown* v. *Urquhart,* 139 Federal 846. In this case petition for habeas corpus was filed with the federal district court (Circuit then) before petitioner had exhausted his state remedies. On appeal, *Urquhart* v. *Brown,* 205 U. S. 179, 27 Sup. Ct. 459 this Honorable Court adopted its rule that a person must first exhaust all of his remedies in the state courts and apply for further review to this court before a federal district court has jurisdiction to entertain a hearing on habeas corpus provided for in Secs. 451, 452 and 453 of Title 28 U. S. C. A.; R. S. Secs. 751, 752 and 753, Feb. 13, 1925. And this Honorable Court specifically refused to decide the merits of the constitutional question as relating to the 14th amendment, saying, "Without expressing opinion as to the constitutionality of the statute." Pg. 460 of Sup. Ct. citation.

An identical federal statute was held unconstitutional in *Barry* v. *Hall,* 98 F. (2d) 222 by the United States Court of Appeals for the District of Columbia.

In view of these divergent opinions, the grave question involving personal liberty, the apparent danger of dispensing with the fundamental guaranty of hearing before permanent commitment and the fact that arbitrary institutional authorities could prevent release of an individual during his entire life on the slightest and most flimsy testimony on a subsequent hearing testing sanity in which the onus of proving sanity would be on petitioner and practically leaving the liberty of the petitioner to depend upon the uncontrolled pleasure of the hospital commission thus creating a most dangerous scheme entirely opposed to the constitutional provisions securing to every one the protection of due process of law, it is respectfully submitted that this Honorable Court should decide this question in finality. Since the statute is a harsh one it would be well for legislative bodies, state courts and the profession of the bar and the public to know to what extremes may a law go in dispensing with hearings before a permanent and final commitment of an individual. The Michigan Supreme Court ruling is clearly erroneous and not in accord with the principles of applicable decisions of this court and is directly contrary to *Barry* v. *Hall, supra* and *Brown* v. *Urquhart,* Fed. Dist. *supra.*

WHEREFORE, your petitioner respectfully prays: (1) that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Michigan commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; (2) that the judgment of the Supreme Court of Michigan may be reviewed and re-

versed by this Honorable Court, and (3) that your petitioner have such further relief in the premises as to this Honorable Court may seem meet and just.

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Dated May 18, 1943.